

Persons who transfer tangible personal property incident to providing service under separate maintenance agreements or service contracts are acting as servicemen and incur Use Tax liability based upon their cost price of tangible personal property transferred incident to the completion of the maintenance agreements. See 86 Ill. Adm. Code 140.301(b)(3). (This is a GIL).

July 27, 2001

Dear Xxxxx:

This letter is in response to your letter received by our office on June 1, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found on the Department's Internet website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

One of our vendors of CITY/STATE, has been charging State of Illinois sales tax to our predecessor and now us, on our maintenance agreement with them. The maintenance agreement gives us the right to pick up the telephone and ask questions and seek their resolutions. With out the agreement we can not do this. It is our interpretation that in accordance with the Illinois Administrative Code Section 140.301 no tangible personal property has been transferred in honor of a maintenance agreement and therefor we should not be charged or paying State of Illinois sales tax.

Our vendor has charged 6.25% sales tax on our predecessor and now to us in violation of Illinois Code. We have had our attorney render us his interpretation of this Section and advise AAA as to their improper collection of sales tax. We have requested AAA, several times, to cease the improper collection of sales taxes and refund us the amount previously paid to them by our predecessor and us in the amount of \$1,796.32 and they have refused.

We now hereby ask the Illinois Department of Revenue for assistance in this matter. We specifically ask that the Department review Administrative Code Section 140.301, copy enclosed, and advise us and AAA accordingly. I am enclosing for your reference copies of previous correspondence to AAA from ATTORNEY and myself.

DEPARTMENT'S RESPONSE:

The Department is unable to provide you with a specific ruling regarding the maintenance agreement referenced in your letter without more information about the agreement itself and whether it was sold in conjunction with the sale of tangible personal property. However, based upon the limited information contained in your letter and the attachments to the letter, it does not appear to be subject to either sales tax or service occupation tax liability. We have provided a general description below regarding how maintenance agreements are taxed. If you want a binding opinion regarding the agreement, you will need to send a copy of the agreement and all contracts to the Department along with a request for a Private Letter Ruling as described below. Please feel free to send a copy of this letter to AAA.

Maintenance agreements that cover computer software and hardware are treated the same as maintenance agreements for other types of tangible personal property. The taxability of maintenance agreements depends upon if charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. No tax is incurred on the maintenance services or parts when the repair or servicing is performed.

If maintenance agreements are sold separately from tangible personal property, sales of the agreements are not taxable transactions. However, when maintenance services or parts are provided under the maintenance agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance agreement. See the enclosed copy of 86 Ill. Adm. Code 140.301(b)(3). Further, the purchaser of the separate agreement or warranty is not charged tax on the labor or tangible personal property that is transferred incident to the completion of the maintenance agreement. If a deductible is charged to the purchaser under the terms of the separate agreement, the deductible is also not subject to tax.

Generally, sales of "canned" computer software are taxable retail sales in Illinois. However, if the computer software consists of custom computer programs, then the sales of such software may not be taxable retail sales. See subsection (c) of the enclosed copy of 86 Ill. Adm. Code 130.1935. In addition, licenses of software as provided in subsection (a)(1) of Section 130.1935 are also not subject to tax.

Charges for updates of canned software are fully taxable pursuant to Section 130.1935. If the updates qualify as custom software, as provided in subsection (c)(3) of Section 130.1935, or are transferred as part of a license of software as provided in subsection (a)(1) of Section 130.1935, those updates are not taxable. If a maintenance agreement provides for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreement would be taxable as a sale of canned software.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b) described above.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk
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